

No. 12826.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

PETITION OF APPELLANT FOR REHEARING.

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*To the Honorable, the United States Court of Appeals for
the Ninth Circuit:*

Lawrence Barker, the appellant herein, by and through his attorneys of record, hereby petitions this Honorable Court to rehear the above entitled case, and upon rehearing to modify its decision and to grant the relief prayed for.

On November 25, 1952, this Court affirmed the decision of the District Court upon the grounds (not relied upon by the District Court¹) that (1) appellant's basis for his

¹The District Court's decision was based entirely upon the conclusion that the exchanges in 1923, whereby appellant acquired his Securities Company stock, were all nontaxable exchanges within Section 112(b)(5) of the Revenue Act of 1934 (identical with Section 112(b)(5) of the Revenue Act of 1932) [R. 144-145], a conclusion correctly rejected by this Court in its decision.

Securities Company stock is the same as the basis of the Barker Delaware stock (Slip Op. 7) which was issued in exchange for appellant's Barker California stock, and (2) the basis of the Barker Delaware stock was the same as the basis of the Barker of California stock exchanged because the "Barker California-Barker Delaware transaction was a reorganization under the Revenue Act of 1932." (Slip Op. 14.)

Appellant does not now question the correctness of the Court's decision that the Barker California-Barker Delaware transaction was a reorganization under the Revenue Act of 1932. We respectfully submit, however, that the exchange falls not only under Section 112(b)(3) and Section 112(i)(2) of the Revenue Act of 1932, as stated by the Court (Slip Op. 14), but also falls under Section 112(c)(1) of the Revenue Act of 1932, which states:

"If an exchange would be within the provisions of subsection (b)(1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property."

This Court has recognized that as part of the plan of reorganization "a contract was made between the C. H. Barker group and the Lawrence Barker Interests on the one hand and the Bankers on the other whereby the Bankers agreed to buy . . . 10,870 shares of Barker Delaware first preferred stock from the Lawrence Barker Interests; . . .," (Slip Op. 4), and that the "Lawrence

Barker Interests . . . would thus end up with cash” (Slip Op. 4) at least to that extent. As further stated by the Court, “pursuant to the terms of the agreement of December 20, 1923, the Securities Company sold to Bankers 10,870 shares of first preferred stock of Barker Delaware for \$1,000,040 plus dividends accrued.” (Slip Op. 6.)

The exchange of Barker California stock, therefore, by appellant in 1923, was not solely for Barker Delaware stock, but for Barker Delaware stock and cash, at least to the extent of \$1,000,040. Under the provisions of Section 112(c)(1) of the Revenue Act of 1932, *supra*, gain of at least \$1,000,040 must, therefore, have been taxable to appellant from the 1923 transactions. (See *First Seattle Dexter Horten National Bank, et al. v. Commissioner* (C. C. A. 9th, 1935), 77 F. 2d 45.)

This is clearly the decision of the Board of Tax Appeals, on similar facts and an identical statute, in *Henry Hudson v. Commissioner*, 39 B. T. A. 1075, 1095 (Acq. 1939-2 C. B. 18), wherein it is stated:

“. . . Herein the reorganization was dependent upon the sale of 100,000 shares of Sylphone Co. stock through Barney & Co. (Bankers), and the gain resulting from the exchange is taxable pursuant to Section 203(d)(1) of the Act of 1926 *to the extent of the cash received.*” (Italics added.)

As this Court has stated, the basis of the Securities Company stock to appellant is dependent on the outcome of the Barker California-Barker Delaware reorganization. Obviously, the fact that the Securities Company was formed and that as part of the plan the property to which the Lawrence Barker Interests were entitled as a result

of the Barker California-Barker Delaware reorganization was to be immediately transferred to Securities Company does not change the tax consequences of the Barker California-Barker Delaware reorganization.

The basis for the Securities Company stock, as the appellee has consistently urged and this Court has recognized, is to be determined under the Revenue Act of 1932, by referring to Section 112(b)(5) of that Act, one of the Sections referred to in Section 113(a)(6) of the Revenue Act of 1932, the governing statute as decided by the Court (Slip Op. 7). As the basis of the Securities Company stock is thus to be determined from the basis of the property exchanged therefor, the fact that a part of the Barker Delaware stock thus received by the Securities Company was bound under the contract with Bankers to be sold to them forthwith for cash made that part the equivalent of cash (and, in any event, not *stock* but a contract right to the proceeds from the sale of stock) when transferred to Securities Company.

In other words, the Barker Delaware shares bound under the agreement of sale to Bankers are to be treated as cash or its equivalent (fair market value of property other than that permitted to be received under Section 112(b)(3) of the Revenue Act of 1932, from the Barker California-Barker Delaware reorganization, without recognition of gain) under Section 113(a)(6) of the Revenue Act of 1932. This is true both for arriving at the recognized gain to appellant from the 1923 transactions and for computing the basis of the Securities Company stock then issued to appellant.

In view of the foregoing, the basis of the property exchanged for the Securities Company stock is at least \$2,326,121.86, arrived at as follows: \$1,326,081.86, the

basis of the Barker California shares owned by the Lawrence Barker Interests [R. 32], plus \$1,000.040, the recognized taxable gain to the Lawrence Barker Interests from the Barker California-Barker Delaware reorganization because of the precedent sale of Barker Delaware shares to Bankers as a part of said reorganization.² Thus, the basis for the Securities Company stock in the hands of the Lawrence Barker Interests is \$2,326,121.86.

Applying the foregoing, appellant's basis for his Securities Company stock is at least \$102.17 per share: \$235,031.56, appellant's basis for his Barker California stock [R. 32] plus \$225,139.71, which is $1841.50/8179.69$ of \$1,000.040 (appellant's share of the recognized gain from the Barker California-Barker Delaware reorganization); or \$460,171.28; divided by 4504.13, which is the number of Securities Company shares issued to appellant [R. 28].

In closing, appellant respectfully submits that since there can be no question that appellant would have had recognized gain from the Barker California-Barker Delaware reorganization had the plan not included the formation of Securities Company, this Court's holding that the formation of Securities Company was not an essential

²Section 113(a)(6) of the Revenue Act of 1932. Whether the recognized gain from the Barker California-Barker Delaware reorganization be deemed to be in the form of property (the contract of sale of Barker Delaware shares to Bankers) or of cash (the right to the proceeds from the sale of Barker Delaware shares to Bankers), the result must be the same under the terms of Section 113(a)(6), and the basis of the Securities Company stock in either event is the aggregate of the original basis of Barker California shares and recognized gain from the Barker California-Barker Delaware reorganization since all of the property and cash ultimately rested in Securities Company in exchange for its stock.

part of the Barker California-Barker Delaware reorganization compels the conclusion that appellant did have recognized gain, as aforesaid. We respectfully submit that the Court has not considered this contention in its opinion. In view of the importance of this question to appellant, we respectfully submit that the Court's opinion should deal with this question.

Wherefore, appellant prays that this Honorable Court modify its decision, reverse the decision of the District Court, and determine that the basis of appellant's shares of Securities Company stock is \$102.17 per share.

December, 1952.

Respectfully submitted,

IRELL & MANELLA,
LAWRENCE E. IRELL,
ARTHUR MANELLA,

Attorneys for Appellant.

Certificate of Counsel.

I, Lawrence E. Irell, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

LAWRENCE E. IRELL,
Attorney for Petitioner.